No. 80-83

In the Supreme Court of the United States

OCTOBER TERM, 1980

EDMUND S. MUSKIE, SECRETARY OF STATE, PETITIONER

v.

PHILIP AGEE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PETITION FOR A WRIT OF CERTIORARI FILED
JULY 18, 1980
CERTIORARI GRANTED OCTOBER 6, 1980

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GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

80-1125

APPEAL FROM THE DISTRICT COURT

PHILIP AGEE

v.

EDMUND MUSKIE, SECRETARY OF STATE, APPELLANT

DATE	FILINGS—PROCEEDINGS
1-29-80	Copy of notice of appeal and docket entries from District Court (n-4)
1-29-80	Certified Original Preliminary Record
1-30-80	Certified Original Record (1 vol.); 2 vols. of transcripts under separate cover (n-4)
2-1-80	4-Appellant's motion for an emergency injunction (m-1)
2-1-80	4-Appellee's opposition to appellant's motion for emergency injunction (m-1)
2-4-80	Per Curiam order that the District Court's order is stayed until 5 p.m., Tuesday, February 5, 1980 to permit appellee to ldoge his affidavit, subject to further order of this Court; CJ Wright, SCJ Bazelon and Wilkey, CJ (who did not participate)
2-5-80	4-Appellant's reply to appellee's memorandum and affidavit opposing the motion for a stay pending appeal (m-5)
2-5-80	4-Appellee's affidavit (m-4) (lodged per 2/4/80 order)

2-5-80	Per Curiam order granting appellant's motion for stay and the parties shall file their briefs as follows: Feb. 15th—appellant's brief, 14 days thereafter—appellee's brief and 7 days thereafter—appellant's reply brief. No extension to this schedule will be granted, and the clerk is directed to schedule this case for argument between March 13, and April 16, 1980; CJ Wright, SCJ Bazelon and Wilkey, CJ (who did not participate)
2-19-80	4-Appellant's motion for leave to file typewritten brief without appendix (m-15)
2-19-80	10-Appendix (m-15)
2-20-80	4-Letter from counsel for appellant of additional authorities pursuant to Rule 28(j), FRAP (m-20)
2-26-80	Clerk's order granting appellants motion for leave to file brief without index
2-26-80	7-Appellant's brief (m-15)
2-26-80	15-Appellant's brief (m-19)
3-3-80	15-Appellee's brief (p-29)
3-4-80	Clerk's order, sua sponte, that the following times are allotted for oral argument: appellant—30 minutes and appellee—30 minutes
3-7-80	15-Appellant's reply brief (m-7)
3-14-80	Argued before MacKinnon,* Robb and Wald, CJ's
6-4-80	Letter dated 6-4-80 from clerk to cousnel for appellant requesting certain materials (See Letter).
	*SEE ENTRYS BELOW
6-27-80	4-Appellant's motion for stay of the District Court's order restoring appellee's passport and this Court's mandate pend-

	ing application to the Supreme Court for a writ of certiorari (p–27)
6-27-80	Per Curiam order that the order of the District Court is stayed for a period of 5 days from this date to afford this Court an opportunity to consider any representations which appellee may submit; MacKinnon, Robb & Wald, CJs
6-27-80	Opinion for the Court filed by Circuit Judge Robb
6-27-80	Dissenting opinion filed by Circuit Judge MacKinnon
6-27-80	judgment affirming in part and vacating in part the judgment of the District Court, in accordance with the opinion of this Court filed herein this date
6-27-80	Per Curiam order that the order of this Court filed herein on February 5, 1980, insofar as it granted appellant's motion for stay, is vacated, for the reasons set forth in the opinion for the Court filed herein this date; MacKinnon, Robb and Wald, Circuit Judges; Circuit Judge MacKinnon dissents for the reasons set forth in his dissenting opinion filed herein this date
6-27-80	4-Appellee's opposition to appellant's motion for stay (p–27)
(T)7-2-80	4-Appellant's motion to extend temporary stay of District Court's passport restoration order (p–2)
(T)7-2-80	4-Appellee's opposition to appellant's motion to extend temporary stay (p–2)
(C)7-2-80	Per Curiam order that the temporary stay entered 6/27/80 is extended to 7/18/80 to permit the filing of a petition for certiorari by the appellant is he is so advised; MacKinnon, Robb & Wald, CJs
(C)7-2-80	Copy of above order to District Court

(D)7-14-80	4-Appellant's motion for a stay pending review on certiorari (m-14)
(B)07-16-80	Per Curiam order denying appellant's motion for a stay pending review on certiorari and that the stay entered on 6-27-80 is extended to 7-23-80, to afford appellant a opportunity to apply to the Supreme Court for relief; MacKinnon, Robb and Wald, CJs (Judge Wald did not participate, but have previously indicated that she would deny any stay extending beyond that granted on July 2, 1980.)
(B)07-24-80	Per Curiam order, sua sponte, that the Clerk is directed not to issue the mandate this case until disposition by the Supreme Court of all matters relating to this case now pending before that court; MacKinnon, Robb and Wald, CJ's
(D)7-24-80	1-Appellee's bill of costs (m-21)
(T)7-28-80	Certified copy of order from Clerk, Supreme Court dated July 23, 1980 in SC No. A-73 (80-83) that the order of the United States District Court for the District of Columbia (No. 79-3491) dated January 28, 1980, requiring that respondent's passport be restored is stayed under further order of the Court
(H)8-5-80	Per Curiam order amending opinion of 6/27/80
(T)10-14-80	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari filed in SC No. 80-83 on October 6, 1980; the motion of respondent (Agee) to vacate the stay heretofore entered by the Chief Justice is denied

DATE	NR.	PROCEEDINGS
1979		
Dec	31	COMPLAINT.

Dec	31	SUMMONS (3) & copies (3) of complaint issued. U.S. Atty. ser 1-2-80. Atty. Gen 1-3-80.
Dec	31	MOTION of pltf for a TRO; P&A; certificate pursuant to Local Rule 1-12; affidavit Melvin L. Wulf; attachment.
Dec	31	MOTION of pltf for TRO, heard & denied; set for hearing 1-2-80 or at such time Judge Gesell desires. (Rep: E. Olsen) PARKER, J.
Dec	31	ORDER denying motion of pltf for TRO; & directing parties to appear before the Judge assigned to this case for further proceedings on 1-2-80 or as soon thereafter as the Court's schedule permits. (N) PARKER, J.
1980		
Jan	03	PLTF to file motion for summary judgment by 1-9-80; Govt to respond by 1-14-80; arguments set for 1-18-80, 9:30 AM. (Rep: Watson) GESELL, J.
Jan	09	APPEARANCE of Allan Adler as co-counsel for pltf. CD/N
Jan	09	MOTION of pltf for summary judgment; statement of material facts; P&A.
Jan	14	CROSS-motion of deft for summary judgment; statement of genuine issues; P&A; exhibits A-C.
Jan	18	REPLY memo of pltf in support of motion for summary judgment; statement of genuine issues.
Jan	18	CROSS-motions for summary judgment argued & taken under advisement. (Rep: Weber) GESELL, J.
Jan	21	WITHDRAWAL of appearance of David E. Landau as atty for pltf. CD/N
Jan	29	MEMORANDUM & ORDER filed 1-28-80 granting motion of pltf for summary

		judgment; denying motion of deft for summary judgment; directing that the pltf's passport be restored. (N) 1 GESELL, J.
Jan	29	NOTICE of appeal by deft from memo & order entered 1-28-80. Copies mailed to Mr. Adler & Mr. Wulf. Govt.—no fee. 2
Jan	29	COPIES of notice of appeal & docket entries transmitted to USCA.
Jan	29	PRELIMINARY record on appeal delivered to USCA.
Jan	29	MOTION of deft for stay pending appeal; P&A; affidavit of John N. McMahon; exhibits A-C.
1979		
Dec	31	COMPLAINT. 3
Dec	31	SUMMONS (3) & copies (3) of complaint issued. U.S. Atty. ser 1-2-80. Atty. Gen. ser 1-3-80. 4
Dec	31	MOTION of pltf for a TRO; P&A; certificate pursuant to Local Rule 1-12; affidavit Melvin L. Wulf; attachment. 5
Dec	31	MOTION of pltf for TRO, heard & denied; set for hearing 1-2-80 or at such time as Judge Gesell desires. (Rep: E. Olsen) PARKER, J.
Dec	31	ORDER denying motion of pltf for TRO; & directing parties to appear before the Judge assigned to this case for further proceedings on 1-2-80 or as soon thereafter as the Court's schedule permits. (N) 6 PARKER, J.
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Jan	14	CROSS-motion of deft for summary judgment; statement of genuine issues; P&A; exhibits A-C.
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Jan	18	CROSS-motions for summary judgment argued & taken under advisement. (Rep: Weber) GESELL, J.
Jan	21	WITHDRAWAL of appearance of David E. Landau as atty for pltf. CD/N 11
Jan	29	MEMORANDUM & ORDER filed 1-28-80 granting motion of pltf for summary judgment; denying motion of deft for summary judgment; directing that the pltf's passport be restored. (N)GESELL, J.
Jan	29	NOTICE of appeal by deft from memo & order entered 1-28-80. Copies mailed to Mr. Adler & Mr. Wulf. Govt.—no fee.
Jan	29	COPIES of notice of appeal & docket entries transmitted to USCA.
Jan	29	PRELIMINARY record on appeal delivered to USCA.
Jan	29	MOTION of deft for stay pending appeal; P&A; affidavit of John N. McMahon; exhibits A-C.
1980		
Jan	29	MOTION of deft to stay pending appeal granted until 2-4-80 to allow deft to see expedited stay before USCA. (N) GESELL, J.

Jan	29	ORDER granting motion of deft for stay pending appeal to the extent that this Court's order dated 1-28-80 is stayed until close of business on 2-4-80. (N) 13 GESELL, J.
Jan	30	TRANSCRIPT of proceedings for 1-3-80; pp. 1-18; Rep: I. Watson. (Court Copy) 14
Jan	30	TRANSCRIPT of proceedings for 1-29-80; pp. 1-15; Rep: I. Watson. (Court Copy) 15

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF

v.

CYRUS VANCE, ET AL., DEFENDANTS

Washington, D.C.
January 3, 1980

The above-entitled cause came on for Hearing before THE HONORABLE GERHARD A. GESELL, United States District Judge, at 9:00 a.m.

APPEARANCES:

MELVIN L. WULF, Esq.,
Of: CLARK, WULF, LEVINE & PERATIS,
New York, New York,
Counsel for Plaintiff

GLEN V. WHITAKER, Esq.,
Department of Justice,
JEFFREY SMITH, Esq.,
Department of State,
Counsel for Defendants

IDA Z. WATSON
Official Reporter
U.S. Court House
Washington, D.C.

COPY FOR:
MR. WHITAKER

[2] **PROCEEDINGS**

THE CLERK: Civil Action No. 79-3491, Agee v. Vance. Mr. Melvin L. Wulf for the Plaintiff. Mr. Glen Whitaker and Mr. Jeffrey Smith for the Defendants.

THE COURT: I understood, Mr. Wulf, that you suggested in a call to chambers that we have this meeting to set up future scheduling in this matter.

MR. WULF: That was my understanding, Your Honor, yes.

If I may propose a schedule to Your Honor. I see this as an urgent case, that as long as the passport stands revoked, Agee's rights to travel continue to be cumulatively impaired.

I would like to urge very strongly the earliest possible disposition on the preliminary and permanent injunction. There aren't any factual disputes in the case, purely a paper case, issues of law.

We are attacking the authority of the Secretary of State to do this on its face.

We have prepared a memorandum in support of our TRO and preliminary injunction which we would like a few days to refine because we did that very quickly.

I would suggest that we could get that in by the middle of next week; give the Government a few days. They have had our memorandum of law since Monday anyhow. We are [3] not going to add any new issues. As I say, we are merely going to refine it. I should think they would be able to get their answering memorandum in in a few days; and then if you should want oral argument, that we do that the following week.

That is my proposal under what I see as the urgent circumstances of the case.

THE COURT: In other words, you are prepared to concede that your client is causing or is likely to cause serious damage to the national security and you want to just test the regulations?

MR. WULF: Yes. I believe that the Secretary of State, based on clear Supreme Court doctrine in Kent v. Dulles and Zemel v. Rusk, doesn't have any authority to impose these regulations.

That is what I want to argue. I am confident that that will be the result. Forgive me for anticipating the decision.

THE COURT: And, therefore, the factual issues of whether Agee was causing or likely to cause serious damage to the national security would be conceded.

MR. WULF: I would—in fact, I wouldn't concede it in law. I would concede it for purposes of the preliminary injunction, yes.

THE COURT: You concede it for purposes of the [4] determination of the validity of the regulation.

MR. WULF: Yes, I think even under those circumstances the Secretary of State cannot on his own discretion revoke a passport.

Yes, I think that is clear from the cases.

THE COURT: I understand that legal position but I wanted to be sure when you said there were no facts in dispute that my approach would be in terms of an assumption, underlying factual assumption.

MR. WULF: I would concede that, Your Honor.

THE COURT: Otherwise, I think there are factual issues probably that have to be ventilated.

Then you would, in effect, move for summary judgment.

MR. WULF: If you care to see it that way.

THE COURT: I am just wondering. Wouldn't that be the way to do it? File a motion for summary judgment based purely on legal attack on the regulation and then have the response come in promptly and we would hear it.

MR. WULF: Theoretically, I can't file that until twenty days after filing the action.

THE COURT: No, but I would give you permission.

MR. WULF: I would be perfectly happy to do it as a summary judgment. I think procedurally it comes to the same thing.

[5] THE COURT: I think it does. I just wondered how we would classify it.

MR. WULF: I referred myself to the steel seizure cases which in fact came up on a preliminary injunction and was disposed of that way very quickly. I would be happy to do it in a way which—

THE COURT: We can do it that way, too. It makes no difference to me.

MR. WULF: I will be happy to file a motion for summary judgment.

THE COURT: Let's see what the Government's position is with respect to that and then we will work out a time schedule.

As far as I am concerned, while I am on trial continuously from now until May, we will break into the trials and dispose of this on a prompt schedule.

MR. WULF: All right. I appreciate that, Your Honor.

MR. WHITAKER: Good morning, Your Honor.

THE COURT: Good morning.

MR. WHITAKER: May it please the Court, my name is Glen Whitaker and I represent the Defendants in this case, with the Department of Justice.

Your Honor, we also wish to see this case resolved expeditiously. However, we believe that Mr. Agee should be [6] required to pursue the administrative remedies which are available to him under the regulations and which the Department of State has already expressed to him the desire to go forward expeditiously with that administrative process.

THE COURT: As I understand it, he has waived that.

MR. WHITAKER: Your Honor—

THE COURT: As I understand from the papers, he has waived that.

MR. WHITAKER: I understand he doesn't wish to pursue the administrative remedies but I think that it would be more useful for the Court and in the interest of judicial economy for him to be required to pursue the administrative remedies.

THE COURT: Why? What would it have to do with the validity of the State Department regulation?

MR. WHITAKER: I think there is some case authority for the proposition that he could raise that issue in the administrative process. He could press his claims, all of his

claims that he has raised here through the administrative process.

I am informed that there are new regulations which just went into effect in early November which allow for an appeal by Mr. Agee, after the initial hearing process before the hearing officer, up to the Board of Appellate Review. If he is successful anywhere along the line there, then that [7] is the end of the case. The matter cannot then be appealed by the State Department after there has been a decision by the Board of Appellate Review. It would not be appealed to the Secretary.

So if Mr. Agee succeeds anywhere along the line, if he presents evidence to establish that he is not likely to pose some damages—

THE COURT: No, he concedes it. He says he is a danger to national security and he says you are proceeding illegally, that you got a regulation that doesn't meet the requirements of Zemel. It is perfectly within your authority to have a Zemel regulation but for some reason you have decided you are not going to do it.

I must say the Court doesn't understand why. You want to just go after this man. They say you can't do that under the regulation.

That is the issue. Why isn't that a perfectly clear legal issue, particularly when the Court is aware that you have Government authority from the Supreme Court to meet what apparently is your primary concern about this man and you have not chosen to follow it.

You have not chosen to follow the Zemel approach and you haven't, for example, invoked some of your statutory authority such as 22 U.S.C. 1732.

You want to go this way. They say: Well, if you [8] want to go this way, they want to test the validity of your regulation.

I don't see anything wrong with that.

MR. WHITAKER: Your Honor, I don't see anything wrong with it but I think that that issue could be raised in the administrative process and if he were successful

through that administrative process, then there would be no need for Your Honor to render a decision on the matter.

THE COURT: I don't mind rendering decisions. That is my job.

In the meantime, this man is in limbo, isn't he?

MR. WHITAKER: Well—

THE COURT: Has he surrendered his passport?

MR. WHITAKER: Not that I am aware of.

THE COURT: Well, why hasn't he? He was told to.

MR. WHITAKER: Your Honor, I don't—

THE COURT: Can't you arrest him?

MR. WHITAKER: Your Honor, I don't believe so, not in Germany, no.

THE COURT: That surprises me. You mean you can't make him surrender his passport under international law when he has been directed to do so?

The Germans ought to ship him back here, then, if he won't surrender his passport.

MR. WHITAKER: Your Honor, we have been informed [9] that there are no present plans by the German Government to deport Mr. Agee.

THE COURT: In other words, Germany is going to allow him to have sanctuary there as a stateless person?

MR. WHITAKER: Your Honor, I don't know what their plans are. As far as him being a stateless person, he is free to return to the United States at any time.

THE COURT: How?

MR. WHITAKER: The State Department is prepared to issue him whatever identity card is necessary to return to the United States.

THE COURT: I can understand that.

MR. WHITAKER: With respect to the administrative process, if Your Honor believes that the administrative process is not appropriate in this instance—

THE COURT: I don't see how it contributes anything to the legal issue, the initial legal issue of the validity of the regulations.

If Plaintiff does not prevail on this, then we have a series of factual issues and I suppose then the question is whether they should be ventilated by administrative hearing or they should be ventilated in this case by deposition and a factual inquiry. But that is the second stage.

MR. WHITAKER: Well, Your Honor, we feel that if there is going to be any question about whether or not the [10] regulation was properly applied to Mr. Agee, whether his activities fell within the coverage of the—

THE COURT: They concede that his activities do.

MR. WHITAKER: Assuming that we can stipulate in our motions for summary judgment that his activities clearly fall within coverage of the regulation and that his activities do pose damage to the national security, then I agree with Your Honor, we can go forward on the legal issue.

THE COURT: As I understand the position, they are prepared to concede they are causing or likely to cause serious damage to the national security, which is the language of 51.70(b)(4).

MR. WHITAKER: Yes, Your Honor.

THE COURT: Now, Mr. Wulf, when would you file?

MR. WULF: I could file by Wednesday, Your Honor, of next week.

THE COURT: Wednesday. That would be in the form of a motion for summary judgment.

MR. WULF: Yes, Your Honor.

THE COURT: How much time would you like to respond to that?

MR. WHITAKER: Assuming that there is not a great deal more from Mr. Wulf, I believe, Monday, Your Honor.

THE COURT: So that would be Monday—

THE CLERK: January 14.

[11] THE COURT: —January 14.

Now I will want to hear argument and I think we ought to set an argument. I am on trial that whole week, am I not?

THE CLERK: Yes.

THE COURT: Could we set argument for nine-thirty on Friday, the 18th?

MR. WHITAKER: Yes, Your Honor.

MR. WULF: Yes.

THE COURT: I have got a jury trial and the easiest thing for me to do is just excuse the jury for Friday and give the lawyers a long weekend, Mr. Wulf, and turn to your matter at nine-thirty on the 18th.

MR. WULF: That date is fine with me, Your Honor.

THE COURT: All right, fine.

MR. WULF: May I just say one thing on the question of concession of the facts.

We are also going to attack the regulation on its face for being over-broad. Our concession is limited by that legal attack also.

THE COURT: Yes, but he would fall within the core of the objective of the regulation. Your client, you would be conceding, falls within the core of the objective of the regulation and the fact that it may be over-broad as to somebody else isn't very persuasive to me.

[12] The question is whether it is over-broad as to him and it can't be over-broad if he is causing serious damage to national security. The question is the validity of the regulation.

MR. WULF: Of course, what they explicitly say in their letter to him is, he is causing it or is likely to cause.

THE COURT: I know but if you concede that he is causing or likely to cause, you concede both. That is what I understood we were talking about.

MR. WULF: I will give that more thought but I still feel that I am going to argue that the regulation is over-broad; and we will try to figure out what the core meaning might be in our analysis of the over-breadth issue.

THE COURT: I am interested in making sure of the concession, Mr. Wulf. That is all. You do concede, for purposes of this motion, that your client is causing or likely to cause serious damage to the national security; is that not correct?

MR. WULF: I don't know that I can make that concession.

THE COURT: I thought that was the basis upon which we have been discussing the matter for the last fifteen minutes.

MR. WULF: Well, to make that concession—our [13] position will be that everything that he is doing within a First Amendment context, that he is publishing and that he is speaking and he is writing—

THE COURT: Then your initial statement to me was quite incorrect.

MR. WULF: But there is nothing in there—

THE COURT: There are substantial factual issues before me then. You can't have it both ways, Mr. Wulf. I thought I was very explicit with you.

I didn't mean to force you into anything but I thought I was quite explicit.

MR. WULF: Yes.

THE COURT: If you wish to withdraw that concession, you may do so. We will then consider what is the best way to proceed in this case.

MR. WULF: I am attacking the regulation on the grounds there is no authority. For that purpose—I think for that purpose I would concede any charge they want to make against him. Sure. That was the reference that I was making.

If they don't have authority to adopt or enforce the regulation, I don't care what the charges are.

THE COURT: That is what I thought you were saying to me.

MR. WULF: Right. I continue to say that.

[14] THE COURT: All right, and that is the only issue

then. You do make that concession for purposes of attacking the regulation.

MR. WULF: But I still would intend to attack the regulation on the ground that it is over-broad and that it can't be applied to Agee or to anyone else because it does affect First Amendment right, First Amendment interest. It would be a classic over-breadth argument.

THE COURT: No, I can't follow that. The affidavits before me—I haven't seen any transcript. I don't know whether any testimony was presented.

MR. WULF: There is none.

THE COURT: Before Judge Parker.

MR. WULF: No, there isn't any, Your Honor.

THE COURT: But the affidavit of Mr. Newsome, for example, specifically calls attention to the information in the press to the effect that your client is contemplating going to Iran for the purpose of participating in an international tribunal which many people would think was to be a firing squad tribunal developed for the purpose of expediting the demise of some of the hostages.

MR. WULF: That appears in Under-Secretary Newsome's affidavit, based upon a story in the New York Post two or three weeks ago.

THE COURT: I understand that. If that is a [15] disputed fact, then we have a different kind of problem before us.

MR. WULF: The fact that the story appeared in the Post is not disputed. I would be happy to submit that with the summary judgment motion papers so you can read it for yourself. It is a story—

THE COURT: You see, you are way off tangent, Mr. Wulf. You are way off the wall on what we are talking about.

You can't stand up in front of me and say that there are no factual issues and then when I press that you concede the facts you say, well, they are just unauthorized and unsubstantiated pieces of paper in the press.

Do you follow what I mean? We have got to go at it one way or the other. I am willing to go at it either way.

MR. WULF: I am trying to feel my way as we are discussing it.

THE COURT: If you want to take some time to feel your way, I don't want to press you. I have a jury trial starting in ten minutes. I can see you again in the middle of the day. Either we have this concession or we don't have this concession.

MR. WULF: Could I just consult with my colleague for a second and I will be right back?

[16] THE COURT: Surely.

(Whereupon counsel consulted.)

MR. WULF: If you are saying, Your Honor, that you will not hear an over-breadth argument and that the only argument that you want to hear is the question of basic authority, we will argue just that question and we will concede the charges as they are made in the letter to Agee, which is part of the record.

THE COURT: Right.

MR. WULF: O.K. Whatever they charge, we will concede it is true.

THE COURT: For purposes of challenging the regulation.

MR. WULF: For purposes of challenging their authority to adopt and apply the regulation.

THE COURT: That is where I thought we were.

MR. WULF: Right. We went around a little bit. That is what I first conceded. I don't want to argue the over-breadth issue. I guess I will have to save that for another day.

THE COURT: You can argue the over-breadth issue but we have to do it in a factual context and I think you are aware that frequently the over-breadth argument is not accepted where its application to an individual is within the core of the permissible area of the regulation.

You can't [17] argue under another set of facts, under some other different situation, this would be over-broad.

MR. WULF: I find the over-breadth doctrine a little bit elusive sometimes as a matter of fact.

THE COURT: It is. I recognize that.

Are you satisfied with respect to this?

MR. WHITAKER: Your Honor, the reason I was pressing for the administrative process before was because I was confused about this concession; but as I understand it, there is a concession for purposes of all of the arguments that he has raised, all of the claims in his complaint that Mr. Agee's conduct clearly falls within the coverage of the regulation, that is, his activity is likely to cause or does cause damage to the national security.

THE COURT: Yes, as you have set it out in your letter to him.

MR. WHITAKER: Yes.

MR. WULF: Yes. That is agreed then.

THE COURT: All right. Then the schedule is as we set it out.

We will have the argument on the 18th. You will file on Wednesday and the Government will file on the following Monday.

MR. WULF: All right. Thank you for hearing us, Your Honor.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF,

-against-

SECRETARY OF STATE, DEFENDANT.

STATEMENT OF MATERIAL FACTS

In compliance with Local Rule 1-9(h), plaintiff submits the following statement of the material facts as to which he contends there is no genuine issue to be tried:

1. Plaintiff is a former employee of the Central Intelligence Agency.

2. Plaintiff resides in Hamburg, West Germany.

3. Plaintiff is a citizen of the United States.

4. Plaintiff was issued United States passport, No. Z 3007741, on March 30, 1978, with an expiration date of March 29, 1983.

5. On December 23, 1979, plaintiff was notified in writing that, under the purported authority of 22 C.F.R. §§ 51.70(b)(4) and 51.71, his passport was revoked, effective immediately.

6. The letter of revocation gave the following reasons for the revocation:

> The Department's action is predicated upon a determination made by the Secretary under the provisions of Section 51.70(b)(4) that your activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States. The reasons for the Secretary's determination are, in summary, as follows: Since the early 1970's it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that compaign you have travelled in various countries (in-

cluding, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba, and Germany), and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.[1]

7. Revocation of plaintiff's passport has caused an will continue to cause him irreparable injury.

/s/ _____
MELVIN L. WULF
Clark Wulf Levine & Peratis
113 University Place
New York, NY 10003
(212) 475-3232

/s/ _____
CHARLES S. SIMS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, NY 10016
(212) 725-1222

/s/ _____
ALLAN ADLER
DAVID LANDAU
c/o National Security Project of the American Civil Liberties Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20003
(202) 544-5380

Attorneys for Plaintiff

JANUARY 9, 1980

[1] Plaintiff concedes the truth of these allegations only for purposes of this motion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-3491

PHILIP AGEE, PLAINTIFF,

v.

SECRETARY OF STATE, DEFENDANT.

PLAINTIFF'S STATEMENT OF GENUINE ISSUES

In response to Defendant's Cross-Motion for Summary Judgment, and his Statement of Material Facts as to which there is no Genuine Issue, Plaintiff hereby submits his responsive statement with respect to each of the Defendant's numbered paragraphs:

1. No genuine issue.

2. No genuine issue.

3. No genuine issue.

4. The December 23rd letter did not advise plaintiff of his right to "an *immediate* administrative hearing under 22 C.F.R. § 51.80 through § 51.105", but only to his right to a hearing thereunder.

5. No genuine issue.

6. On Friday, December 28, 1979, Mr. Agee did decline the offer of a hearing in Hamburg or Washington on Monday, December 31, 1979, but he did not thereby, or in any other way, waive his right to an administrative hearing.

7. For the purposes of resolving the claims raised in his motion for summary judgment, Plaintiff has agreed not to contest the truth of the charges against him in the December 23, 1979 letter, but he has not conceded the truth of those charges for any other purposes. Moreover, he has not agreed that his activities "fall within the core coverage of the challenged regulation", Def. Mem. ¶ 7, believing

that that question is irrelevant under *Aptheker v. Secretary of State*, 373 U.S. 500, 516–517.

Respectfully submitted,

/s/ _____
MELVIN L. WULF
Clark Wulf Levine & Peratis
113 University Place
New York, NY 10003
(212) 475-3232

/s/ _____
CHARLES S. SIMS
c/o American Civil Liberties
Union Foundation
22 East 40th Street
New York, N.Y. 10016
(212) 725-1222

/s/ _____
ALLAN ADLER
DAVID LANDAU
c/o National Security Project
of the American Civil Liberties
Union Foundation
122 Maryland Avenue, N.E.
Washington, D.C. 20003
(202) 544-5380

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No.

PHILIP AGEE, PLAINTIFF,

-against-

CYRUS R. VANCE, SECRETARY OF STATE, DEFENDANT.

AFFIDAVIT

State of New York)
County of New York) ss.:

MELVIN L. WULF, being duly sworn, deposes and says:

1. I am a member of the firm of Clark Wulf Levine & Peratis, 113 University Place, New York, New York 10003, and attorney for Philip Agee, the plaintiff in this law suit. I make this affidavit in support of an application for a temporary restraining order and preliminary injunction.

2. I have known Mr. Agee since 1973, and have represented him as his attorney in several matters since that time. Because Mr. Agee lives abroad, I am making this affidavit. The contents are based either upon my own personal knowledge of the facts, or are drawn from multiple telephone conversations which I have had with Mr. Agee during the past ten days.

3. Philip Agee, the plaintiff in this case, is a citizen of the United States. He is a former employee of the Central Intelligence Agency. He is the author of *Inside the Company: A CIA Diary*, published by Stonehill Publishing Co. in 1975, and he is the author of various articles concerning the activities of the CIA. He is a leading critic of clandestine CIA activities throughout the world.

4. Mr. Agee presently lives in Hamburg, West Germany, with his wife, an American citizen, and his fifteen-

year-old son, Christopher, also a citizen of the United States. His wife is a member of the ballet of the Hamburg Staatsoper, under a contract which expires September 1981. His son is enrolled in the 10th grade of the International School of Hamburg.

5. During all of the times that Mr. Agee has lived abroad, he has held a valid U.S. passport. His current passport, No. Z3007741, was issued on March 30, 1973, and expires on March 29, 1983.

6. On December 23, 1979, the United States Consul General in Hamburg, West Germany, delivered to Mr. Agee a letter notifying him that his passport had been revoked. A copy of the letter is attached hereto. It notifies Mr. Agee of his passport's revocation under the provision of 22 CFR § 51.71. It states that the action is predicated on a determination by the Secretary of State under 22 CFR § 51.70(b)(4), that his "activities abroad are causing or are likely to cause serious damage to the national security or the foreign policy of the United States." It purports to rest that determination upon the following allegations:

> Since the early 1970s, it has been your stated intention to conduct a continuous campaign to disrupt the intelligence operations of the United States. In carrying out that campaign, you have travelled in various countries, (including, among others, Mexico, the United Kingdom, Denmark, Jamaica, Cuba and Germany) and your activities in those countries have caused serious damage to the national security and foreign policy of the United States. Your stated intention to continue such activities threatens additional damage of the same kind.

The letter also informs Mr. Agee of his right of administrative review and appeal under Subpart F of Part 51 of Title 22, C.F.R. The text of that letter is attached to this affidavit.

7. Revocation of Mr. Agee's passport has resulted in the following immediate and irreparable injury to him. First, he is threatened with deporation from West Germany specifically because of his passport's revocation. Two, his de-

portation from West Germany will result in forced separation from his wife who is bound by contract to her employment with the Hamburg Staatsoper Ballet until September 1981, and will seriously disrupt his son's education. Three, deportation from West Germany will result in forced separation from the established base from which he carries on his occupation as a journalist, and where he keeps his voluminous files and records, which are indispensable to him. Four, even if Mr. Agee is not deported from West Germany, he is now prevented from travelling outside of West Germany, since most countries will not admit a traveler without a valid passport. Since his work as a journalist requires widespread travel, including a trip which he has had scheduled for the week of January 5th, revocation of his passport has effectively deprived him of his right to follow his chosen occupation, and has stripped him of his First Amendment rights. It will also deprive the American public of the right to receive the information which Mr. Agee chooses to publish.

8. Mr. Agee will also suffer irreparable injury if he is required to exhaust his administrative remedies in advance of bringing this constitutional challenge to those regulations, even if he is not deported from West Germany. Exhaustion of administrative remedies will be time-consuming in this case. For example, after Mr. Agee demands a hearing, the Department of State has 60 days to initiate the hearing, 22 C.F.R. § 51.81, and the case promises to be protracted. During all of that time, Mr. Agee's passport will remain revoked, he will be unable to travel outside West Germany, and his activities as a working journalist will be substantially if not totally impaired. Moreover, the threat of early deportation from West Germany is substantial and would itself cause irreparable injury.

9. In addition, the requirement of exhaustion would be futile in this case, for the Secretary of State, who initially determined personally to revoke Mr. Agee's passport as required by § 51.70(b)(4), also has final authority in the matter. 22 C.F.R. § 51.104. I was, in fact, told by the Department of State, Legal Advisor, Mr. Robert Owen, in a

phone conversation on December 26, 1979, that the Department had given extensive attention to the question whether to revoke Mr. Agee's passport. Having decided to do so, it is not likely that anything which comes out in the hearing will persuade the Secretary that his initial decision was wrong.

/s/ _____
MELVIN L. WULF

Sworn to before me this 28th day of December, 1979.

/s/ _____
STEPHANIE J. DIXON
Notary Public

STEPHANIE J. DIXON
Notary Public, State of New York
No. 03-4683598
Qualified in Bronx County
Commission Expires March 30, 1980

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE

v.

CYRUS VANCE, DEFENDANT-APPELLANT

Affidavit

Philip Agee, being duly sworn, deposes and says:

1. I am the plaintiff-appellee in the above entitled case. I make this affidavit in opposition to the defendant's motion for stay pending appeal.

2. I presently reside in Hamburg, West Germany, and have regularly consulted with my attorneys about this case by telephone.

3. On February 4, 1980, my attorneys read to me over the telephone the two affidavits submitted by John N. McMahon in support of the government's application for a stay.

4. Based on the assertions and innuendo of the two McMahon affidavits, I provide the following facts.

5. I have and have had no intention of traveling to Iran while any Americans are being held hostage, nor do I even have any present intention of doing so after the hostages are released.

6. I have and have had no intention of revealing the names of any possible CIA personnel in Iran while any Americans are being held hostage.

7. I have never been invited to Iran by its government, The Revolutionary Council, or any representative thereof, for the purpose of sitting on any tribunal whatsoever, or for any other reason. If I should receive such an invita-

tion, I would decline such an invitation until the American hostages are released, if then.

/s/ _____
PHILIP AGEE

Sworn to before me this day of February, 1980.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE

v.

CYRUS VANCE, DEFENDANT-APPELLANT

Affidavit

Melvin L. Wulf hereby declares as true under penalty of perjury, as follows:

1. I am plaintiff's attorney. I make this affidavit in further opposition to the government's motion for a stay pending appeal in this case.

2. We have submitted an unsigned affidavit by Mr. Agee in opposition to the government's motion for a stay pending appeal. The affidavit is unsigned because Mr. Agee lives in Hamburg, West Germany, and time is of the essence in this stay application which affects Mr. Agee's constitutionally protected right to travel.

3. The contents of the affidavit are based upon a telephone conversation which I and my co-counsel, Mr. Charles S. Sims, had with Mr. Agee this date. We read Mr. Agee the two affidavits submitted by Mr. John N. McMahon in support of the government's motion for a stay, and discussed the contents of Mr. Agee's reply, as contained in this affidavit.

4. I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 4, 1980.

/s/ _____
MELVIN L. WULF

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1125

PHILIP AGEE, PLAINTIFF-APPELLEE

v.

CYRUS VANCE, DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1980 I served the foregoing Affidavits of Philip Agee and Melvin L. Wulf upon counsel for the Defendant-appellant by postage prepaid mail to:

Michael F. Hertz
Civil Division, Room 3631
Department of Justice
Washington, D.C. 20530

/s/ _____
MELVIN L. WULF

AFFIDAVIT

Philip B.F. Agee does depose and say as follows:

1. For almost ten years I have made my livlihood by writing and lecturing on American foreign policy and international relations. This work required and continues to require my frequent travel to various countries.

2. My ability to exercise this profession has been severely curtailed during the six months since the Secretary of State revoked my passport. This result is precisely the State Department's purpose in revoking my passport, and they have achieved it despite the Federal District Court's decision in my favor in January 1980. So long as the Court of Appeals continues its stay of the District Court's order

for restoration of my passport, I will be unable properly to exercise my profession and earn my livelihood.

3. For the entire period of the revocation I have been unable to comply with an order of the Civil Court of Rome requiring my presence for testimony in a suit brought to recover monies owed by an Italian company. A copy of the order is attached. Although the hearing was several times postponed, the case is now stalled until I can appear.

4. I was invited by the government of Grenade to attend certain ceremonies and activities in that country in March. My inability to attend prevented me from writing and publishing articles on developments there and in the Carribean in general. A copy of the invitation is attached.

5. I have regular professional and commercial relations with associates in Switzerland that require frequent travel to that country. For six months I have been unable to fulfill my obligation in this respect.

6. I was Special Consultant for the American documentary film, "On Company Business," recently shown on national Public Television in the U.S. I have undertaken a commitment to promote the release of this film on television and theaters in Europe which requires that I travel to many European countries for personal contacts and negotiations. Without a passport I am unable to fulfil this obligation.

7. From September of each year until July of the following year my wife's profession prevents her from taking vacation time. Normally my wife, my sons and I spend vacations during August visiting family and friends outside West Germany. This year, if the stay against restoration of my passport continues, we will be prevented from seeing these people and from fulfilling our vacation plans.

8. My wife has been offered professional contracts that would require our moving from West Germany to another country in Western Europe. Because of the stay of the order to restore my passport and the uncertainty involved, she is penalized professionally because she cannot give serious consideration to other commitments until we know

that I am able to change residence to another country with her.

9. My work involves nothing more than the exercise of my rights to speak and to write, as well as to travel, however critical of certain government activities I may be. I have never been accused of violating the laws of any country. Yet with each passing day without my passport, the Circuit Court of Appeals is preventing me from exercising those rights, and I am injured professionally and financially despite the District Court's decision five months ago that my passport must be returned.

10. I ask the Circuit Court of Appeals to discontinue the stay of the District Court's order.

On this 27th day of June 1980 I declare under penalty of perjury that to the best of my knowledge and belief, the statements made herein are true and correct.

/s/ _____

PHILIP B.F. AGEE
Hamburg, West Germany

Attachments

FEDERAL REPUBLIC OF GERMANY
STATE AND CITY OF
FREIE UND HANSESTADT HAMBURG
CONSULATE GENERAL OF THE UNITED STATES
OF AMERICA

Subscribed and sworn before me this 27th day of June, 1980.

/s/ _____

JAMES P. WALSH
Vice Consul

TRIBUNALE CIVILE DI ROMA

SEZIONE CIVILE

GIUDICE ISTRUTTORE DOTT. SALIME'

Il giorno dodici marzo 1979 sono presenti i procuratori delle parti. A questo punto il Giudice Istruttore Dott. Salimè fa presente che da questa udienza sostituirà il Giudice Istruttore Dott. Feliciangeli, in via definitiva a seguito di provvedimento presidenziale. Stante la necessità di sentire direttamente dalle aprti, al fine di fornire al Giudice una esauriente visione della causa, l'Avv. Marina Petronio chiede che il Giudice voglia disporre l'interrogatorio delle parti sulle circostanze dedotte nell'atto introduttivo del giudizio.

Per la Società convenuta l'Avv. Francioni, associandosi alla richiesta della collega non si oppone, rilevando anch'egli l'opportunità di sentire dalle parti lo svolgimento dei fatti per poter interpretare il comportamento dell'attore e della convenuta.

Il Giudice Istruttore

dispone procedersi a interrogatorio libero delle parti al fine di esaminare e di valutare la fondatezza della doanda attrice e fissa per la loro comparizione l'udienza del 1° giugno 1979 alle ore 10.30 davanti allo stesso Ufficio.

PER COPIA

E' copia fotostatica conforme all'originale esistente nel fascicolo di ... R.G. n 15039/78 Sez ...
G.I. dott ... della causa civile

TRA

AGEE

E

Miss Giuseppe Lopez

che si rilascia a richiesta del sig ...

Roma, li 17 MAR 1979

IL CANCELLIERE

TRIBUNALE CIVILE E PENALE DI ROMA

OFFICE OF THE HIGH COMMISSIONER
FOR GRENADA

Mr. Phillip Agee 29/2/80
C/O Miss Roberge
Schluter Strasse 81,
2000, Hamburg 13,
West Germany,

Dear Mr. Agee,

I wish on behalf of the Prime Minister and the People's Revolutionary Government of Grenada to invite you to attend the March 13th Anniversary Celebrations of the Grenada Revolution.

We regret the late invitation as you are expected to take part in two symposiums, the first one on March 4th and the second one on March 6th.

You will be the guest of the Government for accomodation, transport facilities and other hospitalities.

I hope you will be able to accept this invitation.

Yours Sincerely,

/s/ _____
FENNIS AUGUSTINE
High Commissioner

CERTIFICATE OF SERVICE

I, ROBERT J. BARNHART, hereby certify that on this 2nd day of July, 1980, I served the attached Appellee's Opposition to Appellant's Motion for A Stay upon appellant by personally delivering a copy to:

MICHAEL HERTZ
RM 3636
Department of Justice
Washington, D.C. 20530

/s/ _____
ROBERT J. BARNHART

JULY 2, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2788

PHILIP AGEE, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS;

UNITED STATES OF AMERICA, INTERVENING DEFENDANT/ COUNTERCLAIMANT

MEMORANDUM AND ORDER

As a condition of his employment with the CIA, Agee entered into a Secrecy Agreement with that agency which limited his right to disclose intelligence information. Alleging that the agreement had been violated and that Agree threatened to violate it again in the future, the United States intervened in this Freedom of Information Act suit. It seeks an order that would return to the Government all sums earned by Agee from certain prior writings disseminated in violation of the Secrecy Agreement and to enjoin further breaches of the agreement. The matter is before the Court on cross-motions for summary judgment which were fully briefed and argued.

In his Secrecy Agreement signed on July 22, 1957, Agee stated that he would "undertake not to publish or participate in the publication of any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment by the Agency without specific prior approval by the Agency." *See* Ex. A, Gambino Affidavit. Agee's CIA employment ceased on November 22, 1968. At no time has he been released from this undertaking.

Two essential facts are undisputed. Agee does not deny that he has published books containing intelligence information relating to CIA activities without prior submission

to the agency and in violation of the Secrecy Agreement[1] nor does he deny that he intends to continue his work as an author and journalist, writing on intelligence activities, without complying with the Secrecy Agreement. Moreover, the validity of the standard Secrecy Agreement which Agee executed has been strongly upheld in a recent decision of the Supreme Court, *Snepp* v. *United States*, 48 U.S.L.W. 3527 (U.S. Feb. 19, 1980).[2]

Opposing the proposed order vigorously, Agee offers two affirmative defenses. First, he asserts that the United States comes before this Court with "dirty hands" and should not be granted the equity relief sought. Second, he contends that he is the victim of impermissible "discriminatory enforcement" because the United States has allegedly chosen to litigate against him on the basis of the content of his writings, an impermissible criterion for government action, while choosing not to prosecute individuals whose writings are not so unfavorable to the Agency.

Agee's "dirty hands" argument lacks merit. In a lengthy affidavit, Agee recites a litany of supposed wrongs allegedly perpetrated by government representatives against plaintiff beginning in 1971, three years after plaintiff left the CIA and about the same time that plaintiff began his activities against the agency. But even if these wrongs occurred, which is disputed, they would not foreclose the relief sought by the United States here. In invoking the "dirty hands" doctrine, it is necessary that the wrongs complained of have a close nexus to the cause of

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[1]The United States points to two books among Agee's many publications, *Dirty Work: The CIA in Western Europe* and *Dirty Work II: The CIA in Africa*. Agee was not the sole author of either book. He acknowledges having written a third book, *Inside the Company: CIA Diary*, that also was published without having been submitted for clearance.

[2]The Agreement also was considered in the lower court opinion in *Snepp*, *see* United States v. Snepp, 595 F.2d 926 (4th Cir. 1979), and in Alfred A. Knopf, Inc. v. Colby, 509 F.2d 1362 (4th Cir.), *cert. denied*, 421 U.S. 992 (1975), and United States v. Marchetti, 466 F.2d 1309 (4th Cir.), *cert. denied*, 409 U.S. 1063 (1972).

action. *See, e.g., Keystone Driller Co.* v. *General Excavator Co.*, 290 U.S. 240, 245 (1933); *Neal-Cooper Grain Co.* v. *Kissinger*, 385 F. Supp. 769, 778 (D.D.C. 1974). There is no such nexus here. Plaintiff had long since left the agency when these incidents occurred and the alleged wrong-doing by the agency since 1971 is not sufficiently related to Agee's failure to comply with the Secrecy Agreement.

The discriminatory enforcement argument, however, is more substantial. It is clear that the Government could not enforce the Secrecy Agreement solely on the grounds of sex or of race, *i.e.*, by enforcing it only against women or against blacks. Similarly, it is certain that the Government cannot use enforcement of the Secrecy Agreement for the sole purpose of suppressing speech that is unfavorable to the agency. Agee contends that the agency's actions support his claim that the Government's present motion is primarily motivated by the agency's disagreement with his views. This is sharply denied. On the limited facts submitted by the parties it is difficult, however, to determine to what extent, if any, enforcement of the agreement against Agee is based on the impermissible ground that the agency was offended by the unfavorable material Agee has written.

The United States argues that Agee is in a category by himself with regard to enforcement of the Secrecy Agreement, and that his conduct has been egregious and totally in disregard of the agreement, to the severe detriment of the United States. There is no dispute that Agee has openly flouted his refusal to submit writings and speeches to the CIA for prior approval, and has expressed a clear intention to reveal classified information and bring harm to the agency and its personnel.[3] Thus the risks which at-

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[3] The Government notes, in particular, a press release issued by plaintiff from London on October 3, 1974, in which plaintiff stated:

> Today I announced a new campaign to fight the United States CIA wherever it is operating. This campaign will have two main functions: First, to expose CIA officers and agents and to take the measures necessary to drive them out of the countries where

tend Agee's continuing refusal to abide by the agreement are undoubtedly far greater than the risks posed by many others covered by the agreement.

Agee, however, has presented evidence indicating that the CIA's past enforcement record bears a considerable correlation with the agency's perception of the extent to which the material is favorable to the agency. A reading list of books concerning the CIA, prepared by the CIA itself for recruitment purposes, noted five works as "more critical of the Agency." Four of these works have spawned suits by the Government to enforce the agreement, whereas no suits have been filed against other authors whose works were not listed as "more ctitical," even though some of those authors concededly did not submit their material for prepublication review. Plaintiff thus has raised a factual issue as to whether the Government's past enforcement has been clouded by content considerations rather than wholly legitimate concerns for security.

In view of the foregoing, the Court has determined that it would not be appropriate, on these motions for summary judgment, to impose a constructive trust over the proceeds of Agee's two books, or to order an accounting. Not only is the civil law of discriminatory enforcement uncertain but there are, as noted, unsettled factual issues that can only come clear through time-consuming discovery, if the issues were to be pursued. The past, however, is no mirror of the future. The agency has recently prepared a policy statement on its prepublication review program that demonstrates a sensitivity to First Amendment concerns. Backed by *Snepp*'s endorsement, the agency currently is carrying out a far more systematic and organized program for enforcing its Secrecy Agreement rights. There is no showing that anyone who announces in advance an intention to ignore the agreement and who has

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they are operating; secondly, to seek within the United States to have the CIA abolished. *See* McMahon Affidavit at 3.

It should also be noted that Agee is seeking release of approximately 20,000 documents from the CIA alone in this action, obviously to support his continuing campaign.

egregiously violated it in the past will not be subjected to an enforcement action. The agency, moreover, expressly states that "[a]pproval will not be denied solely because the subject matter may be embarrassing to or critical of the Agency." Furthermore, the "expressed or presumed attitude of a person toward the United States Government or the Agency is not a factor" in determining whether a person suspected of violating the Secrecy Agreement will be recommended for prosecution. (*See* Regulation HR6-2 and Policy of Enforcement, attached to Turner's Affidavit.)

Accordingly, the Court believes that it is entirely appropriate under all the facts and circumstances of this case to issue an injunction against Agee requiring his full compliance with the Secrecy Agreement in the future. Agee has shown a flagrant disregard for the requirements of the Secrecy Agreement, justifying this Court's action to require future compliance and to protect the security of the United States.

The motion for summary judgment filed by the United States is granted in part and a permanent injunction enjoining Agee from further breaches of his Secrecy Agreement shall issue in the form attached. In all other respects the motions of both parties are denied.

SO ORDERED.

/s/ _____

GERHARD A. GESELL
United States District Judge

OCTOBER 2, 1980.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-2788

PHILIP AGEE, PLAINTIFF,

v.

CENTRAL INTELLIGENCE AGENCY, ET AL., DEFENDANTS;

UNITED STATES OF AMERICA, INTERVENING DEFENDANT/COUNTERCLAIMANT

PERMANENT INJUNCTION

This matter having been heard on cross-motions for summary judgment, and the Court having granted the United States a permanent injunction, now therefore it is hereby

ORDERED:

(1) That the plaintiff, Philip Agee, is permanently enjoined from further violation of the terms of his Secrecy Agreement with the Central Intelligence Agency executed July 22, 1957, and, in particular, is enjoined from disseminating, or causing to be disseminated, any information or material relating to the Central Intelligence Agency, its activities, or intelligence activities generally, without the express written consent of the Director of the Central Intelligence Agency or his representative;

(2) That plaintiff's counsel shall promptly serve plaintiff with a certified copy of this Order and shall promptly file with the Court proof of receipt by plaintiff of this Order; and

(3) That the Clerk of Court shall serve plaintiff with a certified copy of this Order by mailing the same to plaintiff

at Schluterstrasse 81, Hamburg, Germany, by certified mail.

/s/ _____

GERHARD A. GESELL
United States District Judge

OCTOBER 2, 1980.

Supreme Court of the United States

No. 80-83

EDMUND S. MUSKIE, SECRETARY OF STATE OF THE UNITED STATES, PETITIONER,

v.

PHILIP AGEE

ORDER ALLOWING CERTIORARI.
FILED OCTOBER 6, 1980

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The motion of respondent to vacate the stay heretofore entered by the Chief Justice is denied.

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 332836 138